NO. 83038-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L. SMITH,

Plaintiffs/Petitioners,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, P.S.; and PAUL SCHWAEGLER, M.D.

Defendants/Respondents

BRIEF OF AMICUS CURIAE OF WASHINGTON STATE HOSPITAL ASSOCIATION, MULTICARE HEALTH SYSTEM, GROUP HEALTH COOPERATIVE, AND PHYSICIANS INSURANCE A MUTUAL COMPANY

Michael Madden, WSBA #8747
BENNETT BIGELOW & LEEDOM, P.S.
Attorneys for *Amicus Curiae*
1700 Seventh Avenue, Suite 1900
Seattle, WA 98101
(206) 622-5511

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Court Rules

I. IDENTITY & INTEREST OF AMICI

The parties submitting this brief are the Washington State Hospital Association, MultiCare Health System, Group Health Cooperative, and Physicians Insurance. The Washington State Hospital Association is a membership organization representing the interests of 97 Washington hospitals, all of which employ health care professionals and are therefore in a position to be impacted by the Court's ruling in this case. A significant number of its members are components of integrated health systems that include physician groups and allied health professionals and facilities.

MultiCare is a not-for-profit integrated health organization based in Tacoma that operates four hospitals, numerous primary care and urgent care clinics, multi-specialty centers, hospice and home health services, and employs physicians and other providers.

Group Health Cooperative is a consumer-governed, not-for-profit integrated healthcare system that operates a hospital, primary and multi-specialty care centers, hospice and home health, urgent care, and behavioral health services in Washington and Idaho. It employs a variety of providers to support these services. Its affiliate Group Health Permanente, PC, employs physicians and certain other providers to

perform services in Group Health Cooperative owned and operated facilities.

Physicians Insurance A Mutual Company is a mutual insurance company based in Seattle that was founded in 1981 under the auspices of the Washington State Medical Association. Although it does not insure the defendants/respondents in this case, it is the largest issuer of health care professional liability insurance in the state of Washington.

Each entity is keenly interested in maintaining a health care system that fosters appropriate provider/patient relationships and preserves patient privacy in accordance with law. Each is also vitally interested in preserving a level playing field in medical liability litigation. As such, these *amici* oppose the efforts of petitioners and the Washington State Association for Justice Foundation ("WSAJF") to expand *Loudon v. Mhyre,* 110 Wn.2d 675, 756 P.2d 138 (1988) far beyond the rationale underlying that decision.

II. STATEMENT OF THE CASE

Plaintiffs' decedent, Brenda Smith, suffered complications following spinal surgery performed by respondent, Dr. Schwaegler. Dr. Kai Johansen, a vascular surgeon, was called in to assess her condition and ultimately operated on her. *See* Petitioner's Opening Brief at 6-10 and portions of the record cited therein. Dr. Johansen's records were obtained

and his deposition was taken prior to trial. No privilege objections were raised during this discovery.

Based on the discovery, it was apparent that Dr. Johansen would not be a favorable witness for the petitioner, but likely would be very helpful to the defense. *See* Petitioner's Opening Brief at 11-15, Respondents' Brief at 10-14 and 20-27, and portions of the record cited therein. When called to testify at trial by defendants, Dr. Johansen stated, consistent with his deposition, that earlier intervention was not indicated and would not have changed the patient's outcome. *See* Respondents' Brief at 47-48 and portions of the record cited therein.

Before Dr. Johansen testified, respondents' counsel sent copies of plaintiff's trial brief, the transcript of the deposition of plaintiff's expert, and an outline of expected areas of direct examination to his lawyer. Dr. Johansen apparently received the brief and deposition transcript, but not the outline of questioning. 11/19 RP 47-48, 51-63, 55-56, 64-65, 72.

III. ARGUMENT

A. Summary

Petitioner and his *amici*, the Washington State Association for Justice Foundation ("WSAJF"), urge the Court to expand *Loudon* to prohibit defense counsel in personal injury cases from communicating in any manner with a witness who is a non-party treating physician,

regardless of whether the communication implicates patient privacy interests or threatens an ongoing patient-physician relationship. Under this supposed "bright-line" rule,[1] any sort of contact between defense counsel and a non-party treating health care provider outside of a deposition or the courtroom would be deemed a *Loudon* violation. Further, they ask the Court to declare that any violation of their proposed rule is so inherently prejudicial as to require a new trial.

These proposed rules should be rejected because they are completely unrelated to the policy considerations underlying *Loudon*. Instead, by requiring an important witness to testify without any preparation or understanding of the questions that may be posed, petitioner and *amicus* seek to impose an unwarranted barrier to the efficient, effective presentation of highly probative evidence.

Additionally, the Court should not expand *Loudon* in the manner suggested by petitioner because to do so would permit interference with the ability of health care organizations that employ physicians and other professionals to gather information regarding medical incidents and events, to obtain the advice of counsel, and to assess their liability or defend themselves in litigation. In several instances, plaintiffs' counsel have utilized *Loudon* as a basis to seek orders preventing counsel for

[1] Pet for Rev. p. 11; WSAJF Amicus Mem. at 8.

health care organizations from communicating about a claim with any of their employed health care providers, except those named as defendants or identified by plaintiffs as "targets" of the lawsuit.[2] For example, in a case where a surgeon employed by a hospital is sued based on an alleged operative mishap, the contention is that *Loudon* prevents the hospital from gathering information from the assistant surgeon, anesthesiologist, nurses and technicians who were part of the surgical team, even though all of them were employees or agents of the defendant health care organization. This type of prohibition is unwarranted under *Loudon* and contrary to state and federal laws that permit disclosure of health care information to counsel for purposes of evaluating and defending liability claims.

For these reasons, *amici* urge the Court to reject petitioners' extreme position and to fashion a decision that goes no further than to protect legitimate patient privacy interests and minimize threats to ongoing patient/physician relationships. In particular, the Court should not extend *Loudon* in a manner that conflicts with laws governing

[2] For example, in *Jacobus v. Kraus,* King Cty. No. 08-2-03749-5, *disc. rev. denied*, Ct. of Apps. No. 63346-5-I, the trial court entered a protective order that prohibited defense counsel from communicating with dozens of treating health care providers affiliated with the University of Washington, except for three identified by plaintiff's counsel as targets of the suit. At the same time, the trial court authorized plaintiff's counsel to have *ex parte* contact with any of the non-targeted providers, including several who held high level management positions within UW Medicine. On the University's motion for discretionary review, the court of appeals' commissioner noted that, because *Loudon* did not address this set of facts, it could not be said that the trial judge committed probable error. A copy of that ruling is appended hereto, not as authority but simply to illustrate the potential application of adopting the rule requested by appellants.

disclosure of protected healthcare information or interferes with the ability of health care providers to obtain the advice of counsel or to effectively present evidence.

B. *Loudon* Was Intended To Protect Legitimate Patient Privacy Interests And Ongoing Patient/Physician Relationships

Loudon established a common law rule based on the Court's assessment of appropriate public policy. The decision was based on four specific concerns about the impact of direct contact between the patient's adversaries and his/her non-party treating physicians. *See Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 822 P.2d 271 (1992) (discussing bases for *Loudon*). The first and primary concern was that the waiver of privilege resulting from commencement of a personal injury suit extends only to relevant information that is discoverable under Civil Rule 26 and that, without plaintiff's counsel being present, the physician might disclose irrelevant but privileged information. *Loudon,* 110 Wn.2d at 677-78; *see also Rowe v. Vaagen Bros. Lumber, Inc.,* 100 Wn. App. 268, 278, 996 P.2d 1103 (2000) ("The primary concern is potentially prejudicial but irrelevant disclosures").

Second, and closely related, *Loudon* reflected a concern that non-party physicians may not understand the appropriate boundaries of the privilege waiver in personal injury cases, and they cannot rely on defense

counsel to advise them on that subject. *Id.* Third, the Court noted that, "for some," there could be a chilling effect on the patient-physician relationship if direct contact with their doctors was permitted. *Id.* at 679; *see also Rowe* at 278 ("the threat that a doctor might talk with a legal adversary outside the presence of plaintiff's counsel could have a chilling effect on the injured person's willingness to continue with treatment and be forthright with the physician"). Finally, the Court indicated that pre-trial interviews might lead to situations where defense counsel was compelled to testify as an impeachment witness about the content of their conversations. *Id.* at 680.

C. *Loudon* did not Establish an Absolute Prohibition

Petitioners argue to extend *Loudon* without regard to any of these underlying policy considerations. This approach is inconsistent with this Court's decisions in *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 822 P.2d 271 (1992), which refused to extend *Loudon* to industrial insurance cases, and *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994), which allowed plaintiff's treating physician to serve as a defense expert. *Holbrook* declined to extend *Loudon* because "the public policy considerations enumerated in *Loudon* are not implicated." 118 Wn.2d at 312. This Court noted that there is no patient-physician privilege with respect to industrial injuries and that the risk of chilling an ongoing

patient-physician relationship is "all but non-existent" where the physician is subject to being called as a witness on behalf of the employer or department. *Id.* at 311, 313.

In *Carson,* the Court was asked to determine whether the patient-physician privilege prevented a non-party treating physician from testifying as an expert witness against his patient. Although the majority addressed *Loudon* in only a tangential manner,[3] *Carson* is nevertheless significant for its holding that there is no residual privilege for adverse testimony by a non-party treating physician. *Carson* states that notwithstanding the risk of undermining the professional relationship;

> [A] physician's duties toward a patient, including the requirement of confidentiality, focus upon medical treatment and medical advice, and do not encompass legal advocacy, whether measured by testimony or a refusal to testify. Once a patient decides to file a medical malpractice action and disclose that which had been confidential, she cannot insist on continued confidentiality from her physicians regarding the condition at issue based on the fiduciary nature of their relationship.

123 Wn.2d at 219.[4]

---

[3] Because the direct contact between defense counsel and the doctor occurred before *Loudon* was decided and was authorized by agreement between counsel, no *Loudon* violation occurred. *Carson* at 227.

[4] The *Carson* dissent argued that under *Loudon,* adverse testimony by a non-party treating physician should be barred unless there was no adequate alternative. *Carson* at 230-31.

D. None of the Interests Identified by *Loudon* are Implicated in this Case

Based on his deposition testimony, it appeared that Dr. Johansen would be an important defense witness. Naturally, defense counsel wanted to do what he could to secure the timely attendance of a busy surgeon at trial and to make sure that his testimony was presented in a clear, effective manner. To this end, he sent background materials and an outline of anticipated direct examination to Dr. Johansen's lawyer. Petitioner and WSAJF completely fail to explain how this conduct implicates any of the policy considerations underlying *Loudon*.

To the contrary, it was clear from the discovery, including production of his records and deposition, that Dr. Johansen possessed no irrelevant privileged information and therefore there was no risk of disclosing such. And, if there was, Dr. Johansen had his own counsel to advise him. There also was no ongoing patient-physician relationship to be jeopardized here: Dr. Johansen only saw the patient for a specific condition and the patient subsequently passed away. Finally, there was no risk that defense counsel would have to testify because he had no direct contact with the doctor except during the deposition.

Rather than protecting any of the interests identified in *Loudon*, the only effect of petitioner's proposed rule would be to impede the effective

presentation of important testimony. That goal is entirely illegitimate under our adversary system of justice, in which the need to "develop all relevant facts" is "fundamental and comprehensive." *United States v. Nixon,* 418 U.S. 683, 709 (1974). It is also fundamentally at odds with this Court's decision in *Carson v. Fine*, which rejected an attempt to preclude non-party treating physicians from presenting evidence that was harmful to their patients' case.

E. Petitioner's Proposed Rule Threatens to Unnecessarily Impede Normal Health Care Operations and Interfere with Attorney-Client Relationships

As noted earlier, some segments of the plaintiff's bar advocate an extreme view of *Loudon*, such that when a health care organization or its individual agents are the targets of a claim, its counsel and claims staff should be prohibited from communicating about the matter with any other employees or agents of the organization. This view is directly at odds with the reality of modern healthcare, where many patients seek care from multi-specialty clinics and health systems because they are integrated and have the ability to communicate information seamlessly between multiple providers. The extreme view of *Loudon* is also at odds with state and federal privacy laws, which permit the use by and disclosure of confidential healthcare information to counsel for purposes of assessing liability and defending claims.

Accordingly, there is little doubt that if petitioner's proposed extension of *Loudon* is adopted without qualification, there will be more requests for court orders prohibiting employed healthcare providers from conferring with counsel for their employers to convey facts pertaining to the treatment at issue and enable their employers to evaluate and defend a claim. To use the example stated earlier, under petitioner's absolutist theory, if a claim is made against a hospital and its employed surgeon based on an alleged mishap in the operating room, the hospital's lawyers and claims staff could not discuss the circumstances with other employees of the hospital who were present during the operation or who may otherwise have relevant knowledge pertaining to the case. Like the relief sought in this case, such a prohibition is unjustified based on the considerations identified in *Loudon.* Furthermore, preventing a health care organization from communicating through counsel with its own employees or agents is contrary to federal law governing disclosure of healthcare information and a substantial infringement on the attorney-client relationship. For these additional reasons, the Court should reject petitioner's position or, at the very least, fashion a ruling that not be susceptible of this extreme application.

1. Disclosure of Healthcare Information to a Healthcare Provider's Lawyer is permitted by Law

There is no privilege or right of non-disclosure that applies when a patient is treated by a health care provider who is a part of an integrated group, clinic, hospital or health care system. Regulations issued under the Health Insurance Portability and Accountability Act, 29 U.S.C. § 1181, *et seq.* ("HIPAA"), permit the use and disclosure of protected health information without a patient's consent for "treatment, payment and health care operations." 45 C.F.R. § 164.506(a) and (c).[5] In the course of normal operations, regardless of whether a lawsuit has been filed, healthcare organizations seek to identify adverse medical incidents and to gather information regarding the nature, extent and cause of these incidents.

---

[5] 45 C.F.R. § 164.506(a) and(c) permit the use and disclosure of protected health information without a patient's consent for purposes of "health care operations." "Health care operations" are defined as:

> any of the following activities of the covered entity to the extent that the activities are related to covered functions: (1) Conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment; (2) Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities."

45 C.F.R. § 164.501.

Their lawyers are often called upon to conduct these reviews and to provide an assessment of potential liability. To this end, use and disclosure of confidential healthcare information to quality assurance, risk management and legal staff are expressly permitted by federal law and state law. *Id.*

In the litigation context, the federal Department of Health and Human Services has issued official guidance interpreting these regulations to permit disclosure of protected healthcare information to legal counsel. *See* U.S. Dept. of Health & Hum. Services, Health Information Privacy, Frequently Asked Questions.[6] That guidance states:

> Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations. The definition of "health care operations" at 45 CFR 164.501 includes a covered entity's activities of conducting or arranging for legal services to the extent such activities are related to the covered entity's covered functions (i.e., those functions that make the entity a health plan, health care provider, or health care clearinghouse). Thus, for example, a covered entity that is a defendant in a malpractice action, or a plaintiff in a suit to obtain payment, may use or disclose protected health information for such litigation as part of its health care operations.

Similarly, the Washington Health Care Information Act, Ch.70.02 RCW, allows disclosure of health care information about a patient without

[6]Available at http://www.hhs.gov/ocr/privacy/hipaa/faq/permitted/judicial/705.html.

the patient's authorization to any person who requires that information "to provide ... legal services ... to ... a health care provider or facility. RCW 70.02.050(1)(b).[7]

These laws and regulations negate any legitimate expectation on the part of patients that, if they have or may have a claim against the organization responsible for their health care, the organization will be prevented from accessing that information as necessary to assess its liability or defend itself in a lawsuit. Several courts have applied these principles to conclude that it is not a violation of a patient's rights for providers within a health care entity to discuss otherwise privileged information with the entity's lawyers. In *Burger v. Lutheran General Hosp.*, 198 Ill.2d 21, 52, 759 N.E. 2d 533 (2001), the Illinois Supreme

[7] RCW 70.02.050(1) provides:

> A health care provider or health care facility may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:
>
> (a) To a person who the provider or facility reasonably believes is providing health care to the patient;
>
> (b) To any other person who requires health care information for health care education, or to provide planning, quality assurance, peer review, or administrative, legal, financial, actuarial services to, or other health care operations for or on behalf of the health care provider or health care facility; or for assisting the health care provider or health care facility in the delivery of health care and the health care provider or health care facility reasonably believes that the person:
>
> (i) Will not use or disclose the health care information for any other purpose; and
>
> (ii) Will take appropriate steps to protect the health care information.

Court held that the state statute permitting intra-hospital communication about a patient, even after initiation of litigation by that patient, did not violate the patient's constitutional right to privacy. The Court reasoned that in the modern hospital setting, health care services are provided by physicians, as well as a wide array of hospital personnel, so that patients often regard the institute of the hospital itself, rather than any individual treating physician, as the primary caregiver. *Id.* at 52-53. Accordingly, a hospital patient could not reasonably expect members of the hospital responsible for his or her care to refrain from discussing the medical care provided to the patient, and as such, "it follows that a patient who enters a highly regulated environment, necessarily involving a number of caregivers, would have a reduced expectation of privacy with respect to the communication of medical information within the hospital setting." *Id.* at 53-54.

In *Estate of Stephens ex rel. Clark v. Galen Health Care, Inc.*, 911 So.2d 277, 282-83 (Fla. App. 2005), the Florida Court of Appeals held that patients' privacy rights were not violated when providers within a unified hospital system discussed their treatment and care with attorneys for the hospital. Earlier, in *Alachua General Hosp., Inc. v. Stewart*, 649 So.2d 357, 358-59 (Fla. App. 1995), the same court held that a hospital's lawyers could speak *ex parte* with three of its staff doctors on the basis

that the hospital must be able to thoroughly investigate the type of care it was providing, particularly when there were allegations that the hospital's care was not meeting acceptable standards. The appellate court stated that upholding a restriction on *ex parte* contacts with hospital employees would frustrate the hospital's ability to provide competent health care and its ability to reduce risks to its patients. *Id.* at 359.

2. Counsel For Health Care Organizations Have An Obligation To Protect Confidential Information

The *Loudon* Court feared that unrepresented non-party physicians might mistakenly disclose privileged information to defense counsel, with whom they had no attorney-client relationship. The situation is entirely different when a health care provider confers with her own lawyer or the lawyer for his employer. In that circumstance, the lawyer has an obligation to advise the provider as to the appropriate scope of disclosure and the provider is entitled to rely on that advice. 45 CFR 164.514(d)(3)(iii)(C) and HIPAA FAQ ("the Privacy Rule permits a covered entity to reasonably rely on the representations of a lawyer who is a business associate or workforce member that the information requested is the minimum necessary for the stated purpose").

Furthermore, the lawyer for a health care entity who receives protected healthcare information has an obligation to make sure that any

further disclosure of that information is necessary and appropriate. 45 CFR 164.514(d)(3)(iii)(C) and HIPAA FAQ ("the lawyer who is a workforce member of the covered entity must make reasonable efforts to limit the protected health information disclosed to the minimum necessary for the purpose of the disclosure. Similarly, a lawyer who is a business associate [outside counsel] must apply the minimum necessary standard to its disclosures, as the business associate contract may not authorize the business associate to further use or disclose protected health information in a manner that would violate the HIPAA Privacy Rule if done by the covered entity").

3. Petitioner's Proposed Rule Would Unduly Interfere With Healthcare Providers' Ability To Obtain The Advice Of Counsel

In today's healthcare environment, in addition to the defense of litigation, institutional healthcare providers regularly utilize in-house and outside counsel to investigate, evaluate and advise them on potential tort and regulatory liabilities. In order to properly perform these duties, prior to or during litigation, lawyers must be able to gather and evaluate all relevant information. Not only do health care privacy laws permit use and disclosure of protected healthcare information for these purposes, but the attorneys' process of obtaining and evaluating information from non-management employees of institutional clients is subject to the attorney-

client privilege. *See Upjohn v. United States,* 449 U.S. 383, 391-92, 101 S.Ct. 677 (1981); *Sherman v. State,* 128 Wn.2d 164, 190, 905 P.2d 355 (1995) (corporate attorney-client privilege extends beyond the "control group" to include communications between counsel and lower level employees, including the gathering of information necessary for counsel to advise the client regarding its potential liabilities).

The ability of counsel for healthcare providers to maintain the attorney-client privilege, and thereby effectively obtain candid disclosure of all relevant information necessary to effectively advise their clients, would be substantially hindered, if not destroyed, if any communication had to occur in the presence of opposing counsel. And, in many cases, the sheer number of employees involved would make it impractical, if not impossible, to depose everyone with potentially relevant knowledge.[8]

Furthermore, allowing plaintiffs to dictate which employees of a healthcare organization are allowed to communicate with its counsel is likely to interfere with the obligations to indemnify and defend that exist between many such organizations and their employed physicians and other professionals. Because the professionals initially named or identified as responsible parties at the inception of a suit may not be the same individuals so named or identified when the matter goes to trial, it is not

[8] Some jurisdictions now limit the number of depositions allowed in civil cases. *E.g.* KCLCR 26(d)(2) imposes a ten deposition limit.

sufficient to say that defense counsel can contact those currently identified as targets by the plaintiff. Rather, health care organizations must be free to discharge their obligations once they (as opposed to plaintiff's counsel) suspect that a claim may reach additional individuals.

IV. CONCLUSION

For these reasons, the Court should reject the arguments advanced by petitioner and WSAJF.

RESPECTFULLY SUBMITTED this 17 day of May 2010.

BENNETT BIGELOW & LEEDOM, P.S.

By: _____

Michael Madden, WSBA #8747
Attorneys for *Amicus Curiae*
Washington State Hospital Association, MultiCare Health System, Group Health Cooperative, and Physicians Insurance A Mutual Company

{2508.00000/M0090160.DOC; 1}

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WILLIAM JACOBUS, individually and as Guardian of ELLEN JACOBUS, a minor, Respondent, v. ERIC KRAUS, M.D., and STATE OF WASHINGTON d/b/a UNIVERSITY OF WASHINGTON, JOHN DOES 1-50, Petitioners.	)	No. 63346-5-I COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

In this medical malpractice action brought by plaintiff William Jacobus against defendants the University of Washington, Dr. Eric Kraus and other treating physicians (the University), the University seeks discretionary review of a trial court protective order that prohibits defense counsel from ex parte contact with Jacobus' treating physicians other than Dr. Kraus and two others and permits plaintiff's counsel to have ex parte contact with any of Jacobus' treating physicians other than Dr. Kraus and two others. For the reasons stated below, review is denied.

In January 2008, Jacobus filed a medical malpractice complaint against Dr. Eric Kraus, a physician employed by the University, and John Does 1-50, identified as individuals who provided health care to Jacobus. The complaint alleges that Dr. Kraus failed to properly manage the administration of an anti-epileptic drug, Lamictal, and

thereby caused Jacobus to have a severe reaction called Stevens-Johnson Syndrome. Jacobus further alleges that the University is liable for the acts of the unnamed individuals. As the case progressed, two resident physicians, Dr. Lyudmila Petruk and Dr. James Crew, were named as defendants. Jacobus asserts that he is seeking damages for all injuries resulting from the alleged negligence, including any subsequent malpractice related to the negligence.[1]

Jacobus has received extensive treatment within the University health care system, including University of Washington Medical Center and Harborview Medical Center, before, during, and after the episode that is the focus of the lawsuit. In his witness disclosure, Jacobus identified approximately 230 University-affiliated health care providers whom he reserved the right to call as witnesses. A dispute arose as to ex parte contact with these providers. Jacobus took the position that under Louden v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), defense counsel could have no ex parte contact with any treating health care provider listed as a potential witness except the "targeted" physicians, Drs. Kraus, Petruk, and Crew. Jacobus also took the position that under Wright v. Group Health Hospital, 103 Wn.2d 192, 691 P.2d 564 (1984), his counsel could have ex parte contact with any of the University-affiliated health care providers except Drs. Kraus, Petruk, and Crew.

The University took the position that it should be allowed to speak directly with University employed treatment providers other than Drs. Kraus, Petruk and Crew, especially those whose testimony may involve issues regarding causation and liability. In an apparent attempt to narrow the controversy, the University provided a list of 17

[1] Plaintiff's Motion for Protective Order.

such individuals, which includes attending physicians who treated Jacobus, as well as those holding administrative positions such as the Director of Emergency Medicine and the Chair of the Department of Rehabilitation Medicine and Chief of Rehabilitation Medicine at Harborview. The University also took the position that Jacobus' counsel should be prohibited from having ex parte contact with hospital employee physicians and residents.

Jacobus sought a protective order, which the trial court granted:

> 1. Defense counsel is prohibited from *ex parte* contact, directly or indirectly, with any of plaintiff William Jacobus' treating physicians other than Dr. Eric Kraus, Dr. Lyudmila Petruk, and Dr. James Crew.
>
> . . . .
>
> 3. Plaintiffs' counsel are permitted ex parte contact with any of plaintiff William Jacobus' treating physicians other than Dr. Eric Kraus, Dr. Lyudmila Petruk, and Dr. James Crew.[2]

The University seeks discretionary review under RAP 2.3(b), probable error that substantially alters the status quo or substantially limits its freedom to act. Both parties renew the arguments they made below.

Regarding paragraph 1 of the order, the University argues that the trial court committed probable error in prohibiting defense counsel from having direct contact with its employees who are nonparty treating physicians. The University argues that the rule in Louden, which prohibits defense counsel from engaging in ex parte contact with a plaintiff's physicians, is not an absolute bar on such contact; that the considerations

---

[2] Paragraph 2 of the order, which required defense counsel to provide a list of all Jacobus' treating physicians with whom defense counsel had had contact, is not at issue.

underlying Louden are absent in this context; that both HIPAA[3] and the Washington Health Care Information Act[4] allow disclosure of health care information about a patient without the patient's authorization to any person who requires the information to provide legal services to a health care provider or facility; that these statutes continue to require appropriate confidentiality and prohibit unauthorized use of patient information; that courts in other jurisdictions permit defense counsel to communicate with their employed physicians in cases like this;[5] and that a blanket prohibition runs afoul of other interests, including interfering with the ordinary functions of University counsel.

Jacobus argues that Louden is and has been for more than twenty years an absolute bar on ex parte contact between defense counsel and treating physicians; that the policies underlying Louden remain true in this context; that the University overstates the problem because it is not prohibited from contact with treating physicians, but is only limited to having contact through formal discovery; that the law that provides the most protection for patient privacy prevails and that Louden therefore prevails over HIPAA; that Louden does not conflict with the Washington Health Care Information Act; that the out of state cases are not helpful because they rely on specific state statutes; and that the trial court order does not purport to interfere with the University's ordinary risk management activities outside of this case.

---

[3] Health Insurance Portability and Accountability Act, 29 U.S.C. 1181 et seq.

[4] Washington Health Care Information Act, RCW 70.02.050(b)(b).

[5] See, e.g., Burger v. Lutheran Gen. Hosp., 198 Ill.2d 21, 759 N.E.2d 533 (2001); Estate of Stephens ex rel. Clark v. Galen Health Care, Inc., 911 So.2d 277 (Fl. App. 2 Dist. 2005).

In short, the parties dispute the reach of Louden. I am not persuaded by Jacobus' argument that the University's position necessarily requires overruling Louden, and I am persuaded that this case involves multiple circumstances not present or considered in Louden, including an institutional health care provider defendant, treating physicians whose conduct is not at issue but who are employed by the defendant institutional health care provider, and the impact of HIPAA as well as Washington statutes.[6] Having said that, in light of current Washington case law, I cannot conclude that the trial court order prohibiting defense counsel from having ex parte contact with Jacobus' treating physicians is probable error.

Regarding paragraph 3 of the protection order, the University contends that the trial court committed probable error in allowing Jacobus' counsel to have ex parte contact with any of plaintiff William Jacobus' many treating physicians other than Drs. Kraus, Petruk, and Crew because those treating physicians may be speaking agents for the University and Wright prohibits counsel from contacting an opponent's employees who are managing or speaking agents for the employer. Jacobus contends that there was no error because the University failed to present any evidence as to the speaking authority of any particular treating health care provider. Jacobus also asserts that the trial court order has little practical effect because the treating health care providers are now represented by independent counsel and Jacobus has complied with independent counsel's request that all contact with these treating health care providers be through counsel.

[6] This case also includes the additional gloss that the Attorney General represents the named defendants as well as the University's employees and residents.

Wright is a medical malpractice case brought by a plaintiff against Group Health Hospital and an individual physician employed by Group Health. The plaintiff sought to have direct ex parte contact with nurses and other health care providers employed by the hospital. The court noted that the plaintiff sought to interview hospital employees to discover facts incident to the alleged malpractice, not privileged communications. Thus, the attorney-client privilege did not bar plaintiff's attorney from the interviews. Wright, 103 Wn.2d at 195. The question before the court was to determine which of the hospital's health care providers should be protected from approach by adverse counsel. Wright, 103 Wn.2d at 197. The court concluded that plaintiff's counsel was prohibited from ex parte contact with only those hospital employees who have managing authority sufficient to give them the right to speak for and bind the hospital, noting that this "'managing-speaking' agent test" is a flexible one to be applied to the circumstances of each case. Wright, 103 Wn.2d at 201–02. The court also limited its decision: "This opinion shall not be construed in any manner . . . so as to *require* an employee of a corporation to meet ex parte with adverse counsel. We hold only that a corporate party, or its counsel, may not *prohibit* its nonspeaking/managing agent employees from meeting with adverse counsel." Wright, 103 Wn.2d at 203.

To the extent the trial court order allows Jacobus' counsel to have ex parte contact with any and all treating physicians other than Drs. Kraus, Petruk, and Crew without any consideration of whether some of the treating physicians are speaking/managing agents of the hospital, it appears to be probable error. But at this point it also appears that the order does not sufficiently alter the status quo or limit the University's freedom to act so as to call for interlocutory review.

The University argues that the issues it raises are recurring and affect every hospital in the state. The court in Wright and especially Louden sought to balance the burdens of formal discovery with the problems inherent in ex parte contact. See Wright, 103 Wn.2d at 677. The effect of the protective order here is troubling. I am persuaded that the case presents issues that appear to warrant appellate review, but I am not persuaded that it is essential they be decided on interlocutory review in this case. The discovery cutoff of May 26, 2009 has passed, and trial is scheduled to commence July 13, 2009, although the parties agree that it may be continued if the trial judge is unavailable. At this point it appears that review from a final judgment is adequate. See Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 127, 467 P.2d 372 (1970) (remedy by appeal from a final judgment is generally adequate and the court discourages piecemeal review).

Now, therefore, it is

ORDERED that discretionary review is denied.

Done this 4th day of June, 2009.

Mary S. Neel

Court Commissioner